

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

KIMBERLY ELLSWORTH-
GLASMAN,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting
Commissioner of the Social Security
Administration,

Defendant.

CASE NO. 15-cv-05085 JRC

ORDER ON PLAINTIFF'S
COMPLAINT

This Court has jurisdiction pursuant to 28 U.S.C. § 636(c), Fed. R. Civ. P. 73 and Local Magistrate Judge Rule MJR 13 (*see also* Notice of Initial Assignment to a U.S. Magistrate Judge and Consent Form, Dkt. 3; Consent to Proceed Before a United States Magistrate Judge, Dkt. 4). This matter has been fully briefed (*see* Dkt. 11, 12, 13).

After considering and reviewing the record, the Court concludes that the ALJ erred in discounting the opinion of Dr. Deborah Smith, M.D., without providing any specific and legitimate reasons supported by substantial evidence. Had Dr. Smith's

1 opinion been accepted, then the residual functional capacity (“RFC”) would have
2 included additional limitations, and because these additional limitations may have
3 affected the ultimate disability determination, the error is not harmless.

4 Therefore, this matter is reversed and remanded pursuant to sentence four of 42
5 U.S.C. § 405(g) to the Acting Commissioner for further consideration.

6 BACKGROUND

7 Plaintiff, KIMBERLY ELLSWORTH-GLASMAN, was born in 1967 and was 39
8 years old on the alleged date of disability onset of August 1, 2007 (*see* AR. 195-201).
9 Plaintiff has a college degree in speech communications (*see* AR. 44). Plaintiff has work
10 history as a hairdresser, receptionist, retail developer consultant, special events marketing
11 director and promotions coordinator (AR. 249-57). Plaintiff left her last full-time position
12 to have spinal surgery (*see* AR. 45-46).

14 According to the ALJ, through the date last insured, plaintiff has at least the severe
15 impairments of “cervical spondylosis status post fusion; depression, attention deficit
16 hyperactivity disorder (ADHD); obsessive-compulsive disorder (OCD); and pain disorder
17 (20 CFR 404.1520(c))” (AR. 17).

18 At the time of the hearing, plaintiff lived with her husband and their two children
19 (*see* AR. 41).

20 PROCEDURAL HISTORY

21 Plaintiff’s application for disability insurance (“DIB”) benefits pursuant to 42
22 U.S.C. § 423 (Title II) of the Social Security Act was denied initially and following
23 reconsideration (*see* AR. 91-100, 102-114). Plaintiff’s requested hearing was held before
24

1 Administrative Law Judge Joanne E. Dantonio (“the ALJ”) on June 3, 2013 (*see* AR. 37-
2 89). On July 26, 2013, the ALJ issued a written decision in which the ALJ concluded that
3 plaintiff was not disabled pursuant to the Social Security Act (*see* AR. 12-36).

4 In plaintiff’s Opening Brief, plaintiff raises the following issues: (1) Whether or
5 not the ALJ erred when she rejected the medical opinions of treating psychiatrist Deborah
6 Smith, M.D.; (2) Whether or not the ALJ erred when she rejected the medical opinion of
7 examining psychologist Dan Neims, Psy.D.; (3) Whether or not the ALJ provided
8 legitimate reasons for finding plaintiff not credible; (4) Whether or not the ALJ provided
9 reasons germane to Betsy O’Brien for rejecting her lay evidence; and (5) Whether or not
10 this matter should be remanded for payment of benefits (*see* Dkt. 11, p. 1). Because this
11 Court reverses and remands the case based on issue 1, the Court need not further review
12 other issues and expects the ALJ to reevaluate the record as a whole in light of the
13 direction provided below.

14 STANDARD OF REVIEW

15 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner’s
16 denial of social security benefits if the ALJ’s findings are based on legal error or not
17 supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d
18 1211, 1214 n.1 (9th Cir. 2005) (*citing Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir.
19 1999)).

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DISCUSSION

(1) **Whether or not the ALJ erred when she rejected the medical opinions of treating psychiatrist Deborah Smith, M.D.**

Plaintiff contends that the ALJ erred by giving little weight to the opinion of treating psychiatrist Dr. Smith. (*see* Opening Brief, Dkt. 11, pp. 3-11). On December 14, 2012, Dr. Smith opined that when plaintiff's conditions are considered in combination with her chronic pain symptoms, the "resulting limitations are such that she would not be able to sustain any exertional level of activity on a consistent and reliable basis" (AR. 819).

"A treating physician's medical opinion as to the nature and severity of an individual's impairment must be given controlling weight if that opinion is well-supported and not inconsistent with the other substantial evidence in the case record." *Edlund v. Massanari*, 2001 Cal. Daily Op. Srv. 6849, 2001 U.S. App. LEXIS 17960 at *14 (9th Cir. 2001) (*citing* Social Security Ruling ("SSR") 96-2p, 1996 SSR LEXIS 9); *see also Smolen v. Chater*, 80 F.3d 1273, 1285 (9th Cir. 1996). When the decision is unfavorable, it must "contain specific reasons for the weight given to the treating source's medical opinion, supported by the evidence in the case record, and must be sufficiently specific to make clear to any subsequent reviewers the weight the adjudicator gave to the [] opinion and the reasons for that weight." SSR 96-2p, 1996 SSR LEXIS 9 at *11-*12. However, "[t]he ALJ may disregard the treating physician's opinion whether or not that opinion is contradicted." *Batson v. Commissioner of Social Security Administration*, 359 F.3d 1190, 1195 (9th Cir. 2004) (*quoting Magallanes v. Bowen*, 881 F.2d 747, 751 (9th

1 Cir. 1989)). In addition, “[a] physician’s opinion of disability ‘premised to a large extent
2 upon the claimant’s own accounts of his symptoms and limitations’ may be disregarded
3 where those complaints have been” discounted properly. *Morgan v. Comm’r of Soc. Sec.*
4 *Admin.*, 169 F.3d 595, 602 (9th Cir. 1999) (quoting *Fair v. Bowen*, 885 F.2d 597, 605
5 (9th Cir. 1989) (citing *Browner v. Sec. HHS*, 839 F.2d 432, 433-34 (9th Cir. 1988))).
6 However, like all findings by the ALJ, a finding that a doctor’s opinion is based largely
7 on a claimant’s own accounts of his symptoms and limitations must be based on
8 substantial evidence in the record as a whole. *See Bayliss, supra*, 427 F.3d at 1214 n.1
9 (citing *Tidwell, supra*, 161 F.3d at 601).

11 When evaluating the weight to be given to a treating doctor, if the ALJ does not
12 give controlling weight to the treating source’s opinion, the ALJ will “apply the factors
13 listed in paragraphs [20 C.F.R. § 404.1527](c)(2)(i) and (c)(2)(ii) of this section, as well
14 as the factors in paragraphs [20 C.F.R. § 404.1527](c)(3) through (c)(6) of this section in
15 determining the weight to give the opinion.” 20 C.F.R. § 404.1527(c)(2). Such factors
16 include the length of the treatment relationship; the frequency of examination; the nature
17 and extent of the treatment relationship; supportability of the opinion; consistency of the
18 opinion; specialization of the doctor; and, other factors, such as “the amount of
19 understanding of [the] disability programs and their evidentiary requirements.” 20 C.F.R.
20 § 404.1527(c).

22 The ALJ must provide “clear and convincing” reasons for rejecting the
23 uncontradicted opinion of either a treating or examining physician or psychologist.
24 *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996) (citing *Embrey v. Bowen*, 849 F.2d

1 418, 422 (9th Cir. 1988); *Pitzer v. Sullivan*, 908 F.2d 502, 506 (9th Cir. 1990)). But when
 2 a treating or examining physician's opinion is contradicted, that opinion can be rejected
 3 "for specific and legitimate reasons that are supported by substantial evidence in the
 4 record." *Lester, supra*, 81 F.3d at 830-31 (*citing Andrews v. Shalala*, 53 F.3d 1035, 1043
 5 (9th Cir. 1995); *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983)). The ALJ can
 6 accomplish this by "setting out a detailed and thorough summary of the facts and
 7 conflicting clinical evidence, stating his interpretation thereof, and making findings."
 8 *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998) (*citing Magallanes, supra*, 881 F.2d
 9 at 751).

10
 11 In addition, the ALJ must explain why her own interpretations, rather than those of
 12 the doctors, are correct. *Reddick, supra*, 157 F.3d at 725 (*citing Embrey, supra*, 849 F.2d
 13 at 421-22). But, the Commissioner "may not reject 'significant probative evidence'
 14 without explanation." *Flores v. Shalala*, 49 F.3d 562, 570-71 (9th Cir. 1995) (*quoting*
 15 *Vincent v. Heckler*, 739 F.2d 1393, 1395 (9th Cir. 1984) (*quoting Cotter v. Harris*, 642
 16 F.2d 700, 706-07 (3d Cir. 1981))). The "ALJ's written decision must state reasons for
 17 disregarding [such] evidence." *Flores, supra*, 49 F.3d at 571.

18 In general, more weight is given to a treating medical source's opinion than to the
 19 opinions of those who do not treat the claimant. *Lester, supra*, 81 F.3d at 830 (*citing*
 20 *Winans v. Bowen*, 853 F.2d 643, 647 (9th Cir. 1987)). According to the Ninth Circuit,
 21 "[b]ecause treating physicians are employed to cure and thus have a greater opportunity
 22 to know and observe the patient as an individual, their opinions are given greater weight
 23 than the opinion of other physicians." *Smolen, supra*, 80 F.3d at 1285 (*citing Rodriguez v.*
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1 *Bowen*, 876 F.2d 759, 761-762 (9th Cir. 1989); *Sprague v. Bowen*, 812 F.2d 1226, 1230
2 (9th Cir. 1987)). On the other hand, an ALJ need not accept the opinion of a treating
3 physician, if that opinion is brief, conclusory and inadequately supported by clinical
4 findings or by the record as a whole. *Batson*, *supra*, 359 F.3d at 1195 (citing *Tonapetyan*
5 *v. Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001)); *see also Thomas v. Barnhart*, 278 F.3d
6 947, 957 (9th Cir. 2002).

7
8 Here, the ALJ gave Dr. Smith's statement little weight because Dr. Smith based
9 her opinion on exertional physical limitations but had not treated plaintiff for physical
10 symptoms, and because plaintiff's "very active lifestyle" showed that her functioning was
11 greater than what she reported to Dr. Smith (*see* AR. 28). Neither of these reasons is
12 specific, legitimate, and supported by substantial evidence.

13 First, the ALJ's explanation that Dr. Smith's opinion was based on physical
14 limitations though she had not treated plaintiff for physical symptoms shows a
15 misunderstanding of the diagnosis of pain disorder. The ALJ found that plaintiff had the
16 severe impairment of pain disorder (AR. 17). Dr. Smith concurred with the diagnosis of
17 pain disorder made by Dr. Daniel Neims, Psy.D., stating that the disorder was "associated
18 with both psychological factors and a general medical condition" (*see* AR. 819-20).
19 According to the Diagnostic and Statistical Manual of Mental Disorders, the diagnostic
20 criteria for pain disorder are:

21
22 A. Pain in one or more anatomical sites is the predominant focus of the
23 clinical presentation and is of sufficient severity to warrant clinical
24 attention.

1 B. The pain causes clinically significant distress or impairment in
2 social, occupational, or other important areas of functioning.

3 C. Psychological factors are judged to have an important role in the
4 onset, severity, exacerbation, or maintenance of the pain.

5 D. The symptoms or deficit is not intentionally produced or feigned (as
6 in Factitious Disorder or Malingering).

7 E. The pain is not better accounted for by a Mood, Anxiety, or
8 Psychotic Disorder and does not meet criteria for Dyspareunia.

9 (AR. 304).

10 As plaintiff's treating psychiatrist, Dr. Smith had the relationship and the medical
11 expertise to assess and concur with Dr. Neims' diagnosis of pain disorder. Dr. Smith
12 believed that plaintiff honestly reported her symptoms, stating that she had seen no
13 indication of any malingering behavior (*see* AR. 820). While the ALJ claims that Dr.
14 Smith did not review the medical evidence in the file (*see* AR. 28), Dr. Smith's earliest
15 treatment notes demonstrate her awareness of plaintiff's physical medical history,
16 including her C4-C7 fusion and resulting treatment (*see, e.g.*, AR. 499, 503). Dr. Smith
17 acknowledged in her statement that she had not treated plaintiff for her physical
18 conditions but opined that the physical impairments for which plaintiff had been treated
19 elsewhere, combined with the psychological factors she personally observed, limited
20 plaintiff's ability to function (*see* AR. 820). Therefore, the ALJ's rejection of this opinion
21 because Dr. Smith had not treated plaintiff for physical symptoms is not legitimate in this
22 case.

23 Second, an ALJ may discredit a physician's opinion if it contradicts a claimant's
24 testimony about her daily activities. *See Morgan, supra*, 169 F.3d at 601-02 (upholding

1 rejection of physician's conclusion that claimant suffered from marked limitations in part
2 on basis that other evidence of claimant's ability to function, including reported activities
3 of daily living, contradicted that conclusion). Here, the ALJ did not specifically list which
4 activities were inconsistent with Dr. Smith's opinion, stating only that plaintiff's "very
5 active lifestyle demonstrates that the claimant's functioning is ... greater than what she
6 reported to Dr. Smith" (AR. 28). However, even inferring that the ALJ believes Dr.
7 Smith's opined limitations are inconsistent with plaintiff's ability to care for her children
8 and the home, work out, vacation and visit friends, and attend school meetings and her
9 children's sporting events – as outlined elsewhere in the opinion (*see* AR. 28) – none of
10 these time-limited activities necessarily contradict Dr. Smith's opinion that plaintiff
11 cannot "sustain any exertional level of activity on a *consistent* and reliable basis"
12 necessary for full-time employment (*see* AR. 819) (emphasis added).

14 Moreover, plaintiff reported these activities to Dr. Smith over the course of her
15 treating relationship, so Dr. Smith's medical opinion was informed by this information
16 (*see, e.g.,* AR. 483, 503, 756). For the ALJ to decide that Dr. Smith's opinion is
17 contradicted by plaintiff's activities is an improper substitution of the ALJ's own opinion
18 for that of a physician. *See Gonzalez Perez v. Secretary of Health and Human Services*,
19 812 F.2d 747, 749 (1st Cir. 1987) (ALJ may not substitute own opinion for findings and
20 opinion of physician).

22 Also, insofar as the ALJ was implying that Dr. Smith's opinion was based on
23 plaintiff's self-reports, that assertion is not supported by substantial evidence. In her
24 statement, Dr. Smith outlines that in her treating relationship with plaintiff, she had

1 become familiar with plaintiff's previous treatments, made her own observations and
2 treatment recommendations, and reviewed a recent psychological evaluation (*see* AR.
3 818-20). Moreover, Dr. Smith's treatment notes reveal numerous mental status
4 examinations of her own and other objective assessments (*see, e.g.*, AR. 753-59). Further,
5 neither defendant nor the ALJ presented any evidence demonstrating that Dr. Smith
6 relied more heavily on plaintiff's self-reports than the objective evidence. *See Ghanim v.*
7 *Colvin*, 763 F.3d 1154, 1162 (9th Cir. 2014) ("[W]hen an opinion is not more heavily
8 based on a patient's self-reports than on clinical observations, there is no evidentiary
9 basis for rejecting the opinion.") (*citing Ryan v. Comm'r of Soc. Sec. Admin.*, 528 F.3d
10 1194, 1199-1200 (9th Cir. 2008)). Therefore, the ALJ had no specific and legitimate
11 reasons supported by substantial evidence to discount Dr. Smith's opinion.
12

13 Finally, defendant argues that the ALJ rejected Dr. Smith's opinion for the specific
14 and legitimate reason that Dr. Smith "did not indicate any particulars as to how these
15 conditions affect the claimant's mental functioning" (*see* Defendant's Brief, Dkt. 12, pp.
16 6-7; AR. 28). However, this statement by the ALJ was in the context of discussing Dr.
17 Smith's opinion of plaintiff's conditions as treated, not her opinion of plaintiff's abilities
18 when considered in combination with plaintiff's chronic pain (*see* AR. 28). The ALJ later
19 acknowledges that Dr. Smith's ultimate opinion was that plaintiff's physical impairments
20 and psychological pain disorder combine to limit plaintiff from being able to sustain any
21 exertional level of activity on a consistent and reliable basis (*see id.*).
22

23 Defendant also argues that Dr. Smith's opinion regards an issue reserved to the
24 Commissioner (*see* Defendant's Brief, Dkt. 12, p. 7). First of all, the ALJ never stated

1 that she was rejecting the opinion for that reason, making this argument an improper *post*
2 *hoc* rationalization (*see* AR. 28). *See Bray v. Comm’r of SSA*, 554 F.3d 1219, 1225-26
3 (9th Cir. 2009) (“Long-standing principles of administrative law require us to review the
4 ALJ’s decision based on the reasoning and actual findings offered by the ALJ – not *post*
5 *hoc* rationalizations that attempt to intuit what the adjudicator may have been thinking.”)
6 (*citing SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) (other citation omitted)); *see*
7 *also Molina v. Astrue*, 674 F.3d 1104, 1121 (9th Cir. 2012) (“we may not uphold an
8 agency’s decision on a ground not actually relied on by the agency”). Regardless, Dr.
9 Smith states a limit on the exertional level of activity of which plaintiff is capable on a
10 consistent basis; this is not a determination of disability reserved for the Commissioner.
11 *See Hill v. Astrue*, 698 F.3d 1153, 1160 (9th Cir. 2012) (doctor’s opinion that it was
12 unlikely that the claimant could sustain full-time competitive employment is not a
13 conclusion reserved to the Commissioner, but is “an assessment based on objective
14 medical evidence of [the claimant’s] likelihood of being able to sustain full-time
15 employment”).

17 The Ninth Circuit has “recognized that harmless error principles apply in the
18 Social Security Act context.” *Molina, supra*, 674 F.3d at 1115 (*citing Stout v.*
19 *Commissioner, Social Security Administration*, 454 F.3d 1050, 1054 (9th Cir. 2006)
20 (collecting cases)). The Ninth Circuit noted that “in each case we look at the record as a
21 whole to determine [if] the error alters the outcome of the case.” *Id.* The court also noted
22 that the Ninth Circuit has “adhered to the general principle that an ALJ’s error is
23 harmless where it is ‘inconsequential to the ultimate nondisability determination.’” *Id.*
24

1 (quoting *Carmickle v. Comm’r of Soc. Sec. Admin.*, 533 F.3d 1155, 1162 (9th Cir. 2008))
2 (other citations omitted). Here, because the ALJ improperly discounted Dr. Smith’s
3 opinion in forming the RFC and plaintiff was found to be capable of performing work
4 based on that RFC, the error affected the ultimate disability determination and is not
5 harmless.

6 The Court may remand this case “either for additional evidence and findings or to
7 award benefits.” *Smolen, supra*, 80 F.3d at 1292. Generally, when the Court reverses an
8 ALJ’s decision, “the proper course, except in rare circumstances, is to remand to the
9 agency for additional investigation or explanation.” *Benecke v. Barnhart*, 379 F.3d 587,
10 595 (9th Cir. 2004) (citations omitted). Thus, it is “the unusual case in which it is clear
11 from the record that the claimant is unable to perform gainful employment in the national
12 economy,” and that “remand for an immediate award of benefits is appropriate.” *Id.*
13 Here, the outstanding issue is resolving the conflicts in the medical opinion evidence
14 even if Dr. Smtih’s opinion is credited as true. Accordingly, remand for further
15 consideration is warranted in this matter.
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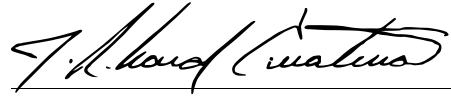
17 Because this will require a reevaluation of the case, the Court need not examine
18 the remaining issues raised by plaintiff on appeal.
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20 CONCLUSION

21 Based on these reasons and the relevant record, the Court **ORDERS** that this
22 matter be **REVERSED** and **REMANDED** pursuant to sentence four of 42 U.S.C. §
23 405(g) to the Acting Commissioner for further consideration consistent with this order.
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1 **JUDGMENT** should be for plaintiff and the case should be closed.

2 Dated this 31st day of July, 2015.

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5 J. Richard Creatura
6 United States Magistrate Judge
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